

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN

UNITED STATES OF AMERICA)	
)	
Plaintiff,)	Civil Action No. 2:10-cv-13101-BAF-RSW
and)	
)	Judge Bernard A. Friedman
NATURAL RESOURCES DEFENSE)	
COUNCIL, and SIERRA CLUB)	Magistrate Judge R. Steven Whalen
)	
Plaintiff-Intervenors)	
v.)	
)	
DTE ENERGY COMPANY, and)	
DETROIT EDISON COMPANY)	
)	
Defendants.)	

**PLAINTIFF UNITED STATES' MOTION FOR STATUS CONFERENCE AND STAY
OF SUMMARY JUDGMENT BRIEFING**

Plaintiff United States hereby requests a status conference to discuss the orderly inclusion of potential additional claims into this case, as well as a timeline for future briefing in this case, should the Court deem any is appropriate. In support of this request, Plaintiff states:

1. The Sixth Circuit Court of Appeals recently reversed this Court's Order on Summary Judgment and remanded the case for further proceedings. ECF No. 164.
2. Heretofore, this case has focused on Clean Air Act (CAA) violations that occurred at Defendants' (DTE's) Monroe Unit 2 electric generating facility. *See, e.g.*, ECF Nos. 1, 8. However, as DTE is well aware, EPA has issued a Notice of Violation to DTE alleging similar violations at several of its other generating units. *See* Preliminary Injunction Hearing Transcript at 141–43 (Jan. 19, 2011) (excerpted at Ex. 1). While the United States agreed to

keep the focus on Monroe 2 for the purposes of accelerating trial and expediting relief,¹ with the return of the case to the district court, the United States is now considering amending its complaint to add claims of CAA violations at several other of DTE's facilities.

3. Additionally, DTE has recently sought leave to file another motion for summary judgment that professes to address the remaining issues in this case in light of the Sixth Circuit's decision, *see* ECF Nos. 165 & 166, but the Company never mentions the already-briefed and -pending motion that relates to precisely the issues it raises. *Compare, e.g.*, ECF No. 166 at 17 (asserting without legal argument that DTE followed EPA's projection regulations) *with* ECF Nos. 117, 127, & 155 (pending summary judgment briefing regarding, *inter alia*, the operation of EPA's emissions projection regulations).

4. In the interest of efficiency and judicial economy, the United States respectfully requests a status conference with the Court and the Parties to discuss whether—and to what extent—additional briefing on these issues is appropriate, and how that briefing should be timed with regard to the amendment of the complaint to incorporate additional claims.

5. Pursuant to Local Rule 7.1(a), counsel for the United States conferred with DTE's counsel to explain the nature of this Motion and its basis, and to request concurrence in the relief requested in this Motion; such concurrence was not obtained.

Respectfully Submitted,

IGNACIA S. MORENO
Assistant Attorney General
Environment & Natural Resources Division

Dated: May 24, 2013

s/ Elias L. Quinn
JAMES A. LOFTON
JUSTIN A. SAVAGE

¹ PI Hearing Transcript at 142 ll. 12–14 (Mr. Benson for the United States: “[F]or the expedited trial we’re talking about here, it would make sense to focus on Monroe 2”).

OF COUNSEL:

SABRINA ARGENTIERI
MARK PALERMO
SUSAN PROUT
Associate Regional Counsel
U.S. EPA Region 5
Chicago, IL
77 W. Jackson Blvd.

APPLE CHAPMAN
Associate Director
Air Enforcement Division
U.S. EPA
1200 Pennsylvania Ave. NW
Washington D.C. 20460

JAMES W. BEERS, JR.
THOMAS A. BENSON (MA Bar # 660308)
KRISTIN M. FURRIE
ELIAS L. QUINN (CO Bar # 42159)
Environmental Enforcement Section
U.S. Department of Justice
P.O. Box 7611
Washington, D.C. 20044-7611
(202) 514-5261
thomas.benson@usdoj.gov

BARBARA McQUADE
United States Attorney
Eastern District of Michigan

ELLEN CHRISTENSEN
Assistant United States Attorney
211 W. Fort St., Suite 2001
Detroit, MI 48226

CERTIFICATE OF SERVICE

I hereby certify that on May 24, 2013, the foregoing motion and supporting materials were served via ECF on counsel of record.

s/ Elias L. Quinn

Counsel for the United States

IN THE UNITED STATES DISTRICT COURT
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EXHIBIT 1

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

And

Civil Action No.
10-13101

NATURAL RESOURCES DEFENSE
COUNCIL, INC., AND SIERRA CLUB,

Proposed Intervener-Plaintiffs,

-v-

DTE ENERGY COMPANY AND
DETROIT EDISON COMPANY,

Defendants.

PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION
BEFORE THE HONORABLE BERNARD A. FRIEDMAN
UNITED STATES DISTRICT JUDGE

100 U. S. Courthouse & Federal Building
231 West Lafayette Boulevard West
Detroit, Michigan 48226
WEDNESDAY, JANUARY 19TH, 2011

APPEARANCES:

For the Plaintiff:

Thomas A. Benson, Esq.
Justin A. Savage, Esq.
Ellen Christensen, Assistant
United States Attorney

APPEARANCES (CONTINUED)

For the Defendants:

F. William Brownwell, Esq.
Mark B. Bierbower, Esq.
James W. Rubin, Esq.
Michael J. Solo, Esq.
Matthew J. Lund, Esq.

ALSO IN APPEARANCE:

**For the Proposed
Intervener-Plaintiffs:**

Nicholas Schroeck, Esq.

Court Reporter:

Joan L. Morgan, CSR
Official Court Reporter

Proceedings recorded by mechanical stenography.
Transcript produced by computer-assisted
transcription.

MOTION FOR PRELIMINARY INJUNCTION
WEDNESDAY, JANUARY 19TH, 2011

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1 the issue in terms of whether was it a major or was it
2 modification. Once we do that, then I think this kind of
3 testimony would be very relevant to determine which way,
4 whatever way it came out in terms of remedy.

5 MR. BENSON: And that really makes sense, your
6 Honor.

7 The one other thing we would suggest and we think
8 it's important particularly as we continue farther and
9 farther from the date in which we originally set the order,
10 that Detroit Edison would abide by pre-project emissions
11 levels. We would like to add a little specificity to
12 that order. Right now I think it just says almost literally
13 pre-project level.

14 As one of their experts said and you saw it in
15 Mr. Chinkin's testimony they sort of -- one of their
16 experts took February of 2010 as a benchmark for monthly
17 emissions path and we can go ahead and use that instead of
18 a monthly emissions path going forward as it were a little
19 bit premature and the evidence would pass on the company
20 based on what they've --

21 MR. BROWNWELL: Your Honor, first on the order
22 issue, we feel the order that the Court has issued is
23 perfectly appropriate. It's clear maintaining emissions at
24 pre-project level, the daytime levels, they were based on
25 Monroe, is a pre-project modification that are annual

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1 emissions --

2 THE COURT: I'm not opposed to putting a date in
3 there. Should there be an alleged violation we have a
4 benchmark because I suspect if there should be that problem
5 how I am going to determine what the benchmark is. So we
6 can talk about whether it's February or what date it is in
7 a second, but what do you think about the trial?

8 MR. BROWNWELL: What is important, your Honor, are
9 annual emissions. Annual emissions are regulated under the
10 New Source Review Program is what triggered modification.

11 As far as the trial goes Detroit Edison has been
12 focused, of course, on preparing for this preliminary
13 injunction hearing and have had only a very limited
14 constrained period of time for its expert preparation, and
15 expert reports. So Detroit Edison would have difficulty in
16 getting ready for trial that soon if we want to supplement
17 its expert reports and expert discovery and perhaps other
18 discovery we thought we would need. The Government has had
19 a lot of discovery against Detroit Edison because it was
20 issuing administrative information under Section 114 of the
21 Clean Air Act going back to earlier this year. So Detroit
22 Edison would want sufficient time for discovery, experts'
23 supplementation and expert discovery.

24 We also are not sure, your Honor, just how big
25 this case is. They are talking about Monroe 2, but there's

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1 this other outstanding motion of violations in July of
2 2009, August, 35 additional projects. If this - the
3 Complaint would be amended to pick up additional projects
4 as the Government suggested that it might be to get a
5 preliminary injunction filed then it's a much different
6 case.

7 THE COURT: Well, two things: Number one, for the
8 Government, the only thing that is before me of what I've
9 read and what I'm concerned with today is the original
10 Complaint which is Monroe 2. Government, are we talking
11 about Monroe 2 or are we talking about something else?

12 MR. BENSON: Your Honor, I think for the expedited
13 trial we're talking about here, it would make sense to
14 focus on Monroe 2 because as the Court knows we've got all
15 the information for the most part together and I think if
16 Mr. Brownwell -- if you guys think there might be some
17 additional discovery, if they want to supplement expert
18 reports in a reasonable time maybe we'll do the same if
19 they do. We can figure out a way to work all that out I
20 think. We probably like to come back before the Court in
21 short order to hammer all that out. But if we want to go
22 ahead on that and then the Government is still considering
23 whether or not to bring additional claims I think those
24 would go forward on a separate track.

25 THE COURT: Those I don't know anything about.

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1 This one I think -- I feel fairly comfortable that in a
2 reasonable period of time if we concentrate on Monroe 2
3 that we can try this case. If it goes to other things I
4 can't deal with that now. As I've said, I've read it in
5 relation to this.

6 In terms of preparation --

7 MR. BROWNWELL: Your Honor, let me suggest if I
8 could that if the case is going to be limited to Monroe 2,
9 it might make sense for additional discussions on the case
10 management proposed order.

11 THE COURT: Well, I can do it today if we agree.
12 We're going to sit down and hammer out a schedule. I have
13 to know an end date first. I need to know whether it's 90
14 days, or 60 days or a 120 days, or it isn't then we can go
15 back and we can talk about when reports are due and so
16 forth.

17 Also, neither side as requested a jury and I have
18 no problems if you want to a jury. If either side wants a
19 jury you can have a jury trial. I don't know if you want
20 one or don't want one. Government, I'm not sure what your
21 position is. Again, it has nothing to do with timing. It
22 has to more to do with scheduling in terms of when we get
23 things done.

24 MR. BENSON: Your Honor, we are prepared to try it
25 before the Court. We won't have to have a jury.

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